



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

(Petitioner)  
c/o Attorney Scott Thompson  
Kittelsen, Barry, Ross, et al  
P. O. Box 710  
Monroe, WI 35660-710

DECISION

MDV-23/47048

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**PRELIMINARY RECITALS**

Pursuant to a petition filed December 4, 2000, under Wis. Stat. §49.45(5) and Wis. Admin. Code §HA 3.03(1), to review a decision by the Green County Department of Human Services in regard to Medical Assistance (MA), a hearing was held on February 12, 2001, at Monroe, Wisconsin.

The issue for determination is whether the county agency correctly imposed a penalty period for MA "institutional services" due to divestment.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

(Petitioner)  
c/o Attorney Scott Thompson  
Kittelsen, Barry, Ross, Et Al  
P O Box 710  
Monroe, WI 35660-710

Wisconsin Department of Health and Family Services  
Division of Health Care Financing  
1 West Wilson Street, Room 250  
P.O. Box 309  
Madison, WI 53707-0309

By: Jeanie Blumer, E.S.S.  
& Atty. William Morgan, Corporation Counsel  
Green County Dept. of Human Services  
N3152 State Road 81  
Monroe, WI 53566

**EXAMINER:**

Nancy J. Gagnon  
Administrative Law Judge  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Green County.
2. The petitioner applied for MA on June 22, 2000. That application was approved. On November 28, 2000, the county agency issued written notice to the petitioner advising that the agency had determined that the petitioner had divested \$18,625 effective November 15, 2000, and that she would be barred from receiving MA institutional services from November 15, 2000, through February 28, 2001.
3. On February 6, 2001, the county agency issued another negative notice as a correction to the November 28 notice. The February 6 notice advises that the MA institutional services disqualification period would run from December 1, 2000, through April 30, 2001, and that the total divestment amount was \$20,153.03.
4. Prior to 1995, the petitioner resided in a home that she owned at (address), Argyle, Wisconsin. She then moved to an apartment, where she lived until she was admitted to a nursing home several years later.
5. In May, 2000, the petitioner, through her attorney-in-fact, entered into a listing contract for the sale of the Argyle residence. The asking price was \$39,900. See Exhibit 2. Because the property was listed for sale, it was exempt from consideration as an asset for MA purposes.
6. The petitioner's attorney-in-fact is her daughter, (daughter). On **April 28, 2000**, the attorney-in-fact executed a "promissory note" for \$3,725, payable in undivided one-sixth interests to (1) Harland (xxx), (2) Melvin (xxxx), (3) Ronald (xxxx), (4) Esther (Xxxx), (5) Mark (xxx), Mike (xxx), and Melody (xxxx), and (6) Dean (xxx), Anthony (xxxx), and Heidi (xxxx). The unsecured note contains no explanation as to why it was created, no interest rate, and no payment due date. This note, and all of subsequent notes referred to herein, bears only the signature of the petitioner's attorney-in-fact. See Exhibits 3, 10.
7. On **May 30, 2000**, the attorney-in-fact executed a promissory note for \$3,725, payable in undivided one-sixth interests to (1) Harland (xxx), (2) Melvin (xxx), (3) Ronald (xxx), (4) Esther (Xxxx), (5) Mark (Xxxx), Mike (xxxxx), and Melody (xxxxx), and (6) Dean (Xxxx), Anthony (xxxx), and Heidi (xxxx). The note was secured by a mortgage upon the petitioner's Argyle property. The note states that it is a gift, and contains no interest rate or due date. See Exhibits 4, 11.
8. On **June 7, 2000**, the attorney-in-fact executed a promissory note for \$3,725, payable in undivided one-sixth interests to (1) Harland (xxxx), (2) Melvin (xxxx), (3) Ronald (xxxx), (4) Esther (xxxx), (5) Mark (xxxx), Mike (Xxxx), and Melody (xxxx), and (6) Dean (xxxx), Anthony (xxxx), and Heidi (xxxx). The note was secured by a mortgage upon the petitioner's Argyle property. The note states that it is a gift, and contains no interest rate or due date. See Exhibits 5, 12.
9. On **July 5, 2000**, the attorney-in-fact executed a promissory note for \$3,725, payable to (daughter). The note was secured by a mortgage upon the petitioner's Argyle property. The note states that it is a reimbursement of "expenses" advanced by (daughter), and contains no interest rate or due date. See Exhibits 6, 13.
10. On **August 4, 2000**, the attorney-in-fact executed a promissory note for \$3,725, payable to (daughter). The note was secured by a mortgage upon the petitioner's Argyle property. The note states that it is a reimbursement of "expenses" advanced by (Daughter), and contains no interest rate or due date. See Exhibits 7, 14.
11. On **September 6, 2000**, the attorney-in-fact executed a promissory note for \$3,725, payable to (daughter). The note was secured by a mortgage upon the petitioner's Argyle property. The note

states that it is a reimbursement of “expenses” advanced by the payee, and contains no interest rate or due date. See Exhibits 8, 15.

12. On **October 4, 2000**, the attorney-in-fact executed a promissory note for \$3,925, payable in undivided one-sixth interests to (1) Harland (xxxx), (2) Melvin (xxxx), (3) Ronald (xxx), (4) Esther (xxxx), (5) Mark (xxxx), Mike (xxxx), and Melody (xxxx), and (6) Dean (xxxx), Anthony (xxx), and Heidi (Xxxx). The note was secured by a mortgage upon the petitioner’s Argyle property. The note states that it is a gift, and contains no interest rate or due date. See Exhibits 9, 16. Exhibits 10-15 (mortgages) were recorded on September 15, 2000, and Exhibit 16 (mortgage of October 4) was recorded on October 18, 2000.
13. The Argyle property was sold for \$32,000, and the closing occurred on November 15, 2000. At that time the mortgages described above were all satisfied. See Exhibits 17, 18. The attorney-in-fact delivered the above-referenced notes and mortgages to the other donees in November, 2000. Because the net proceeds of the sale, before the mortgage satisfactions, was only \$20,153 (rather than the \$26,275 seven note total), the donees were paid less than the face value of the notes in November.
14. The petitioner divested her interest in the Argyle property for the purpose of remaining eligible for MA.

## DISCUSSION

### I. INTRODUCTION.

The asset limit for MA is \$2,000. §49.47(4)(b)3g, Wis. Stats. If a MA applicant, or person acting on the applicant's behalf, transfers assets for less than fair market value, the applicant is ineligible for institutional MA for the number of months obtained by dividing the disposed amount by the statewide average monthly cost (currently \$3,929) to a private pay patient in a nursing home. Wis. Admin. Code §HFS 103.065(5)(b); Wis. Stat. §49.453(3); *MA Handbook*, App. 14.5.2. Such transfers are known as “divestments.” The resulting ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as “MA card services” in MA parlance). The ineligibility or penalty period begins with the month of the first divesting transfer of assets. Wis. Stat. §49.453(3)(a).

In the instant case, there is no dispute that some sort of divestment occurred in connection with the petitioner’s transfer of interests in the real property in Argyle, Wisconsin. The county agency argues that a divestment occurred on the date of sale, in November, 2000. At the time of sale, payment pursuant to the notes executed from April through October, 2000, was made, to the petitioner’s relatives named in the notes. The notes carried face values totaling \$26,275. However, since the net proceeds from the sale of the property were less than this--\$20,153--the agency determined that the divested amount was the amount of money actually given away in November, or \$20,153.

### II. THE PETITIONER ASSERTS THAT THE DIVESTMENT PENALTY PERIOD, IF ANY, BEGAN IN APRIL, 2000.

The petitioner argues that she divested \$3,725 in April, \$3,725 in May, \$3,725 in June, \$3,725 in July, \$3,725 in August, \$3,725 in September, and \$3,925 in October, 2000. She asserts that the first, second,

third, and seventh notes were completed gifts at the time of each note's execution. She also asserts that the fourth, fifth, and sixth notes were completed transfers at the time of those notes' executions.

If the divestment dates were April 28, May 30, June 7, July 5, August 4, September 6, and October 4, 2000, the petitioner runs afoul of the "multiple divestment" prohibition at *MA Handbook*, Appendix 14.6.0. "Multiple divestments" are 2 or more separate divestments made within a 36-month period before the MA application date, or the date of entering an institution, or at any time thereafter. Specifically, the multiple divestment policy directs the agency as follows:

For multiple divestments:

1. Add together all the divested amounts of transfers in the look-back period or any time thereafter that are connected in any of the following ways:
  - a. Transfers that occur in the same month;
  - b. *Transfers that occur in both months of a period of any 2 consecutive months;*
  - c. Transfers with a penalty period (14.5.0) that extends into a month in which there is another transfer; or,
  - d. Transfers with a penalty period (14.5.0) that extends into the month immediately preceding a month in which there is another transfer.
2. Calculate the penalty period (14.5.0).

*(emphasis added)*

*MA Handbook*, Appendix 14.6.0 (5-1-00).

The alleged seven divestments referenced above are multiple divestments and satisfy the criteria in 1.b, above. Therefore, the divestments, are added together and divided by the average nursing home cost to a private pay patient (\$3,726 at the time of application) in order to arrive at the penalty period. Wis. Stat. §49.453(3)(b). All fractions are rounded downward. *MA Handbook*, Appendix 14.5.0. This gives a penalty period of seven months ( $\$26,275/\$3,726$  rate at application, equals 7.05 rounded downward to seven). Initially, this seven-month penalty is actually a worse result than that sought by the county agency (five-month penalty, based on  $\$20,153/\$3,726 = 5.40$ ).

The seven-month penalty period under a multiple divestment theory is less onerous than it initially appears, however, because an argument could be made that the penalty period should have started running in April, 2000. Under this theory, the penalty period ended effective October 31, 2000, which of course is now behind us. The petitioner's institutional costs for those months have now already been paid, and the Department would be left with a futile collection effort against the petitioner for her overpayment.

### III. THE ATTEMPTED GIFT DIVESTMENTS IN APRIL, MAY, JUNE, AND OCTOBER, 2000, WERE NOT COMPLETED UNTIL NOVEMBER, 2000.

I conclude that the attempted divestments in April, May, June, and October, 2000, were not completed until the sale of the property and mortgage satisfactions occurred in November, 2000. The April, May, June and October notes and mortgages were clearly gifts of property interests which were not received by the donees until November. To complete a gift, these elements must be satisfied: (1) intention to give, (2) delivery, (3)

end of dominion by donor, (4) creation of dominion in donee. *Peters v. Peters Auto Sales, Inc.* 37 Wis. 2d 346, 350, 155 N.W.2d 85 (1967). The attorney-in-fact testified that she did not provide copies of the April, May, June and October notes and mortgages to the other donees until November. No testimony was offered as to whether she even advised the other donees of the gifts prior to November. Obviously, no cash from the mortgage satisfactions was paid out until November. Thus, I conclude that, at a minimum, the delivery element of gifting was not met until November.

#### IV. THE TRANSFERS IN JULY, AUGUST, SEPTEMBER WERE INCOMPLETE GIFTS THAT BECAME COMPLETE IN NOVEMBER, 2000.

The petitioner asserts that the transfers in July, August, and September, 2000, were completed in those months, and that they represented simple reimbursements to the attorney-in-fact for her payment of the petitioner's household expenses. The note documents do not identify what expenses the attorney-in-fact is being reimbursed for, or the amount of the expenses.

(Daughter) testified that the actual expense payments that she made on her mother's behalf were heat and electricity payments for the Argyle property. She also testified that she believed that she should be reimbursed for her labor in looking after her mother's affairs, including the time spent on grocery shopping (the petitioner's actual groceries were paid for with her own funds) prior to nursing home entry. However, there is absolutely nothing in the note documents to suggest that payment to (daughter) or any other family member for personal services was to be reimbursed. I do not consider (daughter)' self-serving testimony on this point to be credible. Also, there is no written pre-existing services contract in place between (daughter) and the petitioner.

Further, there was no need for (daughter) to pay the heat and electricity bills from (Daughter)' own funds from May, 2000, onward. In order to have her nursing home "patient liability" cost share reduced beginning with her initial MA institutional coverage, the petitioner provided the agency with a gas bill. The gas bill showed payments totaling \$353.20 over one year. Exhibit 23. She also provided an electric bill showing payments of \$12.95 monthly. Exhibits 24-25. Accordingly, the agency has subtracted the monthly gas and electric charges from the petitioner's nursing home patient liability since May, 2000. Thus, the petitioner was being subsidized by the MA program so that she could pay her own utility bills on the Argyle property. See *MA Handbook*, Appendix 10.5.0-10.6.0; Institutions Unit, p.4; & MA Institution Worksheet. I see no reason why the attorney-in-fact could not have simply paid these same utility bills out of the petitioner's checking account, since funds for these specific expenses should have been available. Thus, the proffered rationale for the July, August, and September notes is not credible.

I conclude that the divestment attempts in July, August, and September were incomplete gifts to Esther (Daughter), that subsequently became completed gifts in November, 2000. It is true that the gift elements of "intent to give" and "delivery" were present in July, August, and September for the transactions described for those months. However, (Daughter) had no real dominion over these three gifts until she received cash in November. The petitioner correctly argues that gifts and/or divestments need not be in the form of cash. However, under the specific facts of this case, (Daughter) had no dominion over anything of substance until November. Dominion is having control or ownership over some quantifiable thing. The July, August and

September notes contained no due dates for payment. Until the property sold and the mortgages had to be satisfied, how would (Daughter) ever be able to state that the note was due and payable? Further, the face value listed on each note was not a reliable indicator of the gift's value, as subsequent events proved. When the real property sold for less than expected, and (Daughter) as creditor did not receive the face amount listed on each note, she did not seek further collection action against the petitioner to collect the balance to which she was allegedly entitled from the gifts of July, August, and September. Thus, in July, August, and September, (Daughter) received pieces of paper that said she had a \$3,725 "guesstimated" interest in unsold real property that would become due on an unknown date, with no enforcement mechanism to liquidate the asset. I fail to see how this gave (Daughter) dominion over any measurable asset.

### **CONCLUSIONS OF LAW**

1. The attempted gift divestments of April 28, May 30, June 7, July 5, August 4, September 6, and October 4, 2000, were not completed gifts until November, 2000.
2. The petitioner divested \$20,153.03 in November, 2000.
3. The county agency correctly determined that a five-month penalty period may be imposed upon the petitioner's MA case.

**NOW, THEREFORE, it is**

**ORDERED**

That the petition herein be dismissed.

### **REQUEST FOR A NEW HEARING**

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of  
Madison, Wisconsin, this \_\_\_\_\_ day  
of \_\_\_\_\_, 2001.

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Nancy J. Gagnon  
Administrative Law Judge  
Division of Hearings and Appeals  
0412/NJG

cc: GREEN COUNTY DEPT OF HUMAN SERVICES  
DHFS - Susan Wood